SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Excerpt from the Report of the Special Master

(pages 4 through 17)

RECOMMENDATIONS AS TO FINDINGS OF FACT

In May 1960 respondent, an Indiana concern, opened up a plant in Ocala, Florida. In June 1960, 17 of its 33 Ocala employees in the bargaining unit involved signed

union authorization cards. Larry S. Davidow, respondent's attorney, declined to negotiate. Warren P. Conary was the union representative. Charges were filed by the National Labor Relations Board and heard by one of its hearing examiners. His finding of failure to negotiate, and also of coercing employees, was affirmed by the Board in November 1961, which issued an order accordingly. The union wrote requesting negotiations, and then became quiescent pending the course of respondent's appeal to this Court and petition for certiorari to the Supreme Court.

In October 1963 this Court handed down its opinion affirming. The opinion stated, among other things:

> So also we find no basis for Skyline Homes' contention that the lapse of time since the filing of the original charges entitle it to an election. An employer will not be permitted to dissipate the union's majority by a series of Section 8(a)(1) violations and then demand that an election be held.

The record here does not make clear what precisely was the union's change in majority status or any change in respondent's total number of employees.

The decree of this Court, filed November 22, 1963, on the finding of failure to bargain, ordered respondent, first, to cease and desist from refusing to bargain in good faith with the union concerning "wages, hours, and other terms and conditions of employment." The decree also ordered respondent, secondly, to bargain collectively with the union. The decree, in each of these directions, ordered such bargaining with the union *"as the exclusive representative of all the** employees" (our emphasis). The decree also ord-

* The word "its" is used instead of "the", in one of the two directions.

ered respondent to post notices "immediately upon receipt thereof" to the effect that it recognizes the union as the exclusive representative of all employees.

Respondent petitioned the Supreme Court for certiorari, which was denied on February 17, 1964.

Respondent now claims—without proof, although it may be and probably is at least substantially true—that by the end of the litigation the number of its employees was 60, with only three of the original employees remaining, and that the union had far from majority backing; it also points out that no respondent employee at any time has been a union member. Respondent also now intimates, again without proof, but with no vehemence or repetition, that its alleged violations have not been responsible for the union's loss, or further loss, of its majority backing.

By letter of March 13, 1964, the union requested respondent to meet with it on March 20 for the purpose of "negotiating", and by letter of March 17, respondent agreed to "meet" with the union, although at its own plant. The union also advertised a meeting with the employees for the night of March 19 at a public hall. By form letter of March 17, 1964 (PX 4), sent to each employee, and drawn by Davidow, respondent not only advised employees that they did not have to attend the meeting advertised by the union, but stated:

> If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union, you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board.

On March 19, Davidow himself appeared at the Tampa office of the Board, stating that respondent had during moving lost the notices sent to it by the office for posting,

and he obtained new ones. More importantly, he presented an RM petition (PX 5) by respondent, stating that it "questions" recognition of the union. He told Mr. Strickland, the compliance officer, that, although respondent would post the notices and bargain to avoid contempt, the union had long since lost majority status and that an election would prove this. Strickland told him that, apart from any question of current union majority, the Court's decree obliged him to bargain for a reasonable time. He cited leading court cases, and expounded on them. Mr. Cole assistant to the Regional Director, said that a reasonable time was usually one year. Davidow finally agreed that actual filing might be withheld until he had time to study the cases.—Respondent did not post the notices by the end of working hours on March 19, and the union meeting with employees that night had an attendance of only 34 employees.

It was with this background of (1) the March 17 letter to employees as to a Board election re a union, (2) the RM petition directed to this, and (3) tardy notice posting, that Davidow met Conary, the union representative, at the March 20 "bargaining" meeting. Conary cited the difficulty in getting the employees together and said that he came to the meeting without proposals; he accordingly asked for an adjournment to April 2, which was agreed to by Davidow. Conary also asked at the meeting that a letter be sent to employees retracting the election reference in the March 17 letter, but Davidow declined.

Instead of a retraction letter, respondent wrote another letter to employees, dated March 20 (PX 8); stating, among other things, that:

> you do not have to have the union represent you if you do not want to.

Davidow also wrote to the Regional Board insisting that the RM petition be filed, and purporting to distinguish the cases cited to him. The petition was filed and dismissed, with a statement quoting the opinion herein of this Court on majority status (see quotation, *supra*), and quoting from the *Franks Bros.* case cited by this Court.

It was with this further and cumulative background of (4) the March 20 letter telling employees they did not have to be represented by the union, (5) the actual filing of the RM petition for decertification or an election, that Davidow met with Conary at the April 2 meeting theretofore arranged. Conary asked whether, in view of respondent's letter to employees and its RM petition, respondent did recognize the union. Davidow said that he would do what the order said, that he would "negotiate"—in fact insisted on going ahead with this "negotiating"—but he reserved his appeal rights on the RM petition.

Davidow took much the same stand on a proposed contract recognition clause submitted by Conary later at the meeting. He also refused to consider two or three other proposed clauses, of a general nature. The union had quite a number of additional proposed clauses, also of a general nature, but did not submit them.

An interrupting factor was that Davidow stated that he wanted a "short" contract of two or three pages, and one confined to "wages, hours, and working conditions" (although the decree uses a much broader phrase than "working conditions"). Conary had nothing at all on wages or hours, a surprising omission, to be sure; he testified that this was because employees wanted to continue on piece rates and he did not know piece work details. Davidow said that Conary's proposed general clauses, i.e., on grievances, arbitration, and the like, were not the day-to-day working conditions, such as sanitary facilities, which he contended were alone contemplated by the de-

cree.—Conary states in his work report, drafted soon after the meeting, that the union "suggested a recess for two weeks to see about preparing a shortened contract."

Conary testified that he and his colleagues decided after the meeting against presenting a proposed short contract, and that, after conferring with Strickland, they decided on first demanding recognition. Conary wrote respondent a curt letter reciting its "refusal to recognize us on April 2nd"; Davidow, calling the letter "astounding", replied by insisting on a date for the next meeting, "even though you do not represent a majority."

On April 15, 1964, the union wrote the Regional Board that respondent would not negotiate and was interfering with its bargaining right. On April 22, 1964, Conary swore to a voluminous affidavit, with exhibits, prepared by Strickland, with a stated conclusion that respondent was in contempt of this Court's decree. Conary also, however, wrote Davidow that he would arrange another meeting upon "notice" that respondent recognized them (a decided retreat, from Conary's request for a contractual recognition clause, to his original query as to whether respondent recognized the union).

In the meantime, a local attorney (Mr. Musleh) was retained by employees. He filed a decertification petition (signed, apparently, by a majority of them) and also filed unfair labor charges against respondent for dealing with a minority union. These petitions were ultimately to be denied, but Davidow used them as an argument against explicitly recognizing the union, despite renewed efforts and legal discussion with him by Cole and Strickland.

By letter, dated May 4, 1964, Conary, after close consultation with Strickland, advised respondent that the union would ask that it be cited for "contempt" and that

no further meeting would be had unless it wrote its employees retracting statements in its prior letters as to a forthcoming election, etc. Davidow's answer charged bad faith and repeats that the union does not represent the majority. By letter of June 5, the union again asked for retraction and "your informing me . . . that you recognize" the union (i.e., again less than contractual recognition).

In June the local attorney for employees asked this Court for review of the denial of their decertification and unfair practice petitions, but met with dismissal in August for lack of jurisdiction. The present petition to punish for contempt was filed on December 2, 1964.

RECOMMENDED CONCLUSION (FACT AND LAW)

I. The opinion therein of this Court expressly and adversely passed on respondent's contention that an employer may dissipate a union's majority by labor act violations and then demand an election—the very contention persisted in by the respondent after the opinion was rendered. The decree implements this by directing respondent to negotiate with the union "as the exclusive representative of all its employees", i.e., even though only a minority may still be backing it.—Moreover, the express language of the Court's opinion herein, as well as that of leading Supreme Court cases, was quoted by the Regional Board to Davidow or the respondent, so that no claim of ignorance thereof can be entertained.

Assuming that under the working of the decree respondent may properly make the showing, it actually has made no showing that its unfair labor practice violations have not been the cause of any dissipation of the union's majority.

II. This Court expressly found that respondent failed to bargain collectively with the union (and also was guilty of Section 8(a)(1) violations)—a bad record for a respondent in a contempt proceeding for failing to bargain collectively, and one which may receive some consideration in determining whether or not there has been bad faith in bargaining.

III. The Court's decree (November 22, 1963, cert. denied February 19, 1964) required not only bargaining with the union, and desisting from not doing so, but bargaining with it "as the exclusive representative of all its* employees," these words being used twice in the dual direction. Notices were ordered posted accordingly.—It was therefore mandatory for respondent not merely to negotiate or discuss with the union, i.e., as a "nobody" or a volunteer, but to negotiate with it as such representative of all employees. For the purpose of determining whether or not it was in contempt of this provision of the decree, it is not necessary to enter into the semantics as to whether or not respondent was under a duty affirmatively to "recognize" the union (i.e., even apart from the notices posted by it, but contradicted by its letters to its employees).

IV. Respondent started off by its letter of March 17, sent to employees—drawn by Davidow, an experienced labor attorney—telling them that they would have a Board election on union representation, if a majority, as respondent therein stated it believed, did not desire the union.—This was contemptuous of this Court's decree, and supporting opinion, if not an actual contempt, and was at least a strong indication of bad faith in connection with the negotiation directed by the decree.

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* Instead of "its" the decree uses "the" in repeating these words.

V. Davidow, respondent's full agent in these dealings and negotiations, presented on March 19, and later filed, respondent's RM petition for decertification, wherein it "questions" union recognition.—This was further contemptuous conduct, if not actual contempt, and was affirmative evidence of bad faith in negotiating, particularly considering the regional board's meticulous advice and citations on the subject. Indeed, actual contempt is indicated, in view of the decree's mandate, both in its cease and desist and its affirmative provisions, that respondent negotiate with the union "as exclusive representative of all its (the) employees." However, since it involves resort to legal procedures provided for by law and not expressly prohibited by the decree, perhaps it should not be regarded as actual contempt.

VI. Respondent's withholding posting of the notices, as directed by the decree, until after working hours of March 19, with an employees-union meeting scheduled that very night, was tardy—and a further indication of bad faith, if not a contempt, by reason of failure to file "immediately", as directed by the decree. The claim that respondent lost the first notices is supported by no testimony or other proof, by nothing except hearsay on hearsay.

VII. Respondent participated in the March 20 meeting with the bad faith and past contemptuous conduct heretofore indicated, i.e., (1) the March 17 letter to employees as to a Board election, (2) the RM petition for decertification, and (3) the tardy posting of notices. Davidow even refused to have respondent send a letter to employees retracting the March 17 statement as to a Board election, although he did grant the union's request for an adjournment to April 2.

VIII. Instead of a retraction of the March 17 letter, there is respondent's letter to employees of March 20, stating in so many words that:

> you do not have to have the union represent you if you do not want to.

This language flies in the face of the words of the decree directing negotiation with the union "as the exclusive representative of all its employees", as well as the notices which had just been posted by respondent, and this could definitely be held to be actual contempt. However, it is sufficient to hold that it constitutes contemptuous conduct and is clinching evidence of bad faith.

IX. Respondent came to the April 2 meeting, with the union, contaminated by its further acts of bad faith and contemptuous conduct of (4) telling the employees that they did not have to have the union represent them, and (5) actually filing the RM petition. At the meeting Davidow refused to say that he recognized the union. He stated that he would negotiate with the union, but it is found that the real meaning of this was that he would talk to it as a "nobody" or a volunteer, and so regard it; he studiously avoided, here or elsewhere, adding the words "as exclusive representative of all employees", or a reasonable equivalent thereof. It is fair to conclude, and it is concluded, that this failure to deal with the union "as exclusive representative of all its employees" is and was a contempt. However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree.

Respondent's efforts to restrict so-called "working conditions" to day-to-day working conditions is further indication of bad faith and contemptuous conduct, and could

well be held a contempt in itself were it not out of regard for the union's own imperfect negotiating. Respondent violated the direction of the decree to cease and desist from refusing to bargain in good faith on "other terms and conditions of employment", and the decree's affirmative direction, referring to no express subject matter, to "bargain collectively."

X. The union failed to come to this April 2 meeting with any proposals on the fundamentals of wages and hours, but came only with proposed "working conditions", such as clauses on arbitration and grievances, of a boiler-plate variety. The union representative testified that it was unable to formulate proposals on wages and hours because employees wanted a piece-work system, on which the union was not prepared.—This inability reflects no glory on the union as engaged in adequate negotiation. However, the issue here is respondent's conduct and good faith, not the union's. It is clear that the union's conduct did not cause respondent's contemptuous conduct.

XI. Davidow at this April 2 meeting asked for a "short" contract on "wages, hours, and working conditions", and in response, the union "suggested a recess for two weeks to see about preparing a shortened contract." However, the union denies that it actually agreed, or bound itself, to prepare such a draft, and it is indeed doubtful that it had intentions within two weeks to present such concrete demands. In any event there is no doubt that the union determined not to do so, its representative deciding that there were "difficulties." The conclusion is justified, perhaps without full proof, that the "difficulties" were lack of employee backing of the union and also the actual preferences of the employees for piece work, as well as, of course, respondent's obstructive and contemptuous tactics. —However, again it is respondent's conduct and good faith

which are under consideration, and in this case the union's conduct has practically no bearing on this issue. Actually, it was respondent's conduct, particularly in regard to recognition, which may largely account for the union's imperfect negotiation.

XII. Instead of setting a date for another meeting, to discuss a different draft, the union, with the advice of the Board's regional office, concentrated on the recognition issue. It is found here that this "switch" in tactics, if it was such, as respondent contends, was justified by respondent's consistently contemptuous conduct in refusing to deal with the union *as* representative of all the employees, and actually treating it as a "dummy." However, although the union filed charges with the regional office, its representative having signed an affidavit to support contempt charges, and although it advised respondent of possible contempt charges, it did not repeat its demand—made only once, to be sure—for a recognition clause in the contract. Instead, it advised respondent it would meet again simply upon "notice" that it was recognized, and as late as June 5 it indicated that it would be satisfied by respondent's "informing me . . . that you recognize the union."

XIII. It is true that a local attorney, who for all that appears to the contrary acted independently, filed a petition, signed apparently by a majority of the employees, to decertify the union, and also filed a request for the issuance of a complaint charging the respondent with unfair labor practices for dealing with an alleged minority union. —However, it is concluded that any reliance on this situation by respondent does not justify its light regard for the express words of this honorable Court in its decree, as well as in its opinion.

XIV. Apart from the question as to whether the filing of the RM petition for decertification is in itself contemptuous, the fact is that this procedure, and the employees' similar procedures, met with no success in the forum selected and provided for by law.

XV. Respondent does not urge, nor interpose a defense, that it is not bound by the acts of Davidow in its behalf, or that it is excused because its conduct, through him or otherwise, was on advice of counsel. However, two observations may be made: First, Davidow was admittedly (Miller's testimony) respondent's fully authorized agent in dealing with the union and the Board, including its regional office. Second, respondent in its answer (designated Statement), par. 3, has admitted the allegation of the petition (called Motion), par. 3, alleging:

> 3. The decree has been in full force and effect since its entry and at all time material herein respondent, its officers and agents, have had notice and actual knowledge of its terms.

Recommended Conclusions of Law Proper

Respondent has not ceased and desisted from refusing to bargain in good faith, nor has it, upon request, so bargained in good faith, as directed in the decree.

Respondent has not ceased and desisted from refusing to bargain with the union as the exclusive representative of all its employees, nor has it, upon request, bargained with the union as the exclusive representative of all the employees, as directed in the decree.

By so failing to cease and desist and by refusing to bargain in good faith with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No.

2292 as the exclusive bargaining representative of the Company's production and maintenance employees, with respect to wages, hours, and working conditions, respondent Skyline Homes, Inc., has engaged in, and continues to engage in, conduct violative of paragraphs 1(a) and 2(a) of the decree of this United States Court of Appeals for the Fifth Circuit, filed November 22, 1963.

Recommended Decree

Accordingly, it appears appropriate that this Court should adjudge respondent in civil contempt and to require respondent, its officers, agents, successors, and assigns to purge such contempt by doing the following, substantially as proposed by petitioner (which includes the posting of new notices by reason of respondent's conduct negating prior notices posted by it):

(a) Upon request, bargaining collectively in good faith with the union as the exclusive representative of its employees in the unit involved in this case and if any understanding is reached, embodying such understanding in a signed agreement; and also desisting immediately from refusing to so bargain in good faith with the union as such representative.

(b) Immediately posting in conspicious places in its Ocala, Florida, plant, including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days copies of:

(1) the appropriate portions of the notice originally required to be posted by the Court's decree;

(2) an appropriate notice signed by respondent which states (a) that respondent has been adjudicated in civil contempt of Court for violating, resisting, disobeying and failing and refusing to com-

ply with the Court's said decree and that respondent will take the actions in purgation ordered by the Court, (b) that contrary to the impression created by respondent, an election under Board auspices has not been imminent, and one is not to be anticipated until the union has had a reasonable time to bargain on behalf of the employees, (c) that the union is entitled, contrary to respondent's prior statement, to represent the employees as their exclusive bargaining agent.

(c) Maintaining such notices in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced or covered by any other material.

(d) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Twelfth Region of the Board, and separately notifying said Director of the Twelfth Region in writing within ten (10) days after the entry of the order of adjudication, showing what steps have been taken by respondent to comply with the Court's directions, and filing further periodic sworn statements as to the manner of respondent's bargaining with the union every thirty (30) days, until further order of the Court.

(e) Paying to the Board fees and all costs and expenditures, including the Master's compensation and expenses, the cost of the reporter, and counsel fees incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding to adjudge respondent in civil contempt.

It also appears appropriate that the Court should further decree that upon a failure of respondent to so purge itself of civil contempt, the Court will levy a fixed compliance fine against it and a further compliance fine per day as long as the noncompliance continues.

It further appears appropriate that the Court take such other and further action and grant such other and further relief as may be adjudged, just, reasonable, and necessary to assure compliance with the Court's decree and as this proceeding in civil contempt may require.